SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: March 7, 2019

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

VC MACON, GA, LLC,	**CASE NO. 18-04802-NPO**
DEBTOR.	**CHAPTER 11**
BANKPLUS	**PLAINTIFF**
VS.	**ADV. PROC. NO. 19-00004-NPO**
J.F. DAVIS	**DEFENDANT**

ORDER REMANDING ADVERSARY
FOR PROCEDURALLY IMPROPER REMOVAL

This matter came before the Court for hearing on February 11, 2019 (the "Hearing"), on the Order to Show Cause (the "Show Cause Order") (Dkt. 5) issued by the Court to counsel for the parties to show cause why the above-referenced adversary proceeding (the "Adversary") should not be dismissed for lack of subject matter jurisdiction. At the Hearing, Craig M. Geno represented the debtor, VC Macon, GA, LLC ("VC Macon"), and J.F. Davis ("Davis"), and William H. Leech represented BankPlus. The Court heard the oral arguments of counsel and took the matter under advisement. No evidence was presented at the Hearing.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Adversary pursuant to 28 U.S.C. § 1334. This is a non-core proceeding under 28 U.S.C. § 157. Notice of the Hearing was proper under the circumstances.

Facts

On December 14, 2018, VC Macon filed a petition for relief under chapter 11 of the Bankruptcy Code. (Bankr. Dkt. 1). VC Macon is owned solely by DL Investments, LLC. Davis is the managing member of DL Investments, LLC. Davis is not a debtor in any bankruptcy case.

On December 21, 2018, BankPlus filed a breach of contract action against Davis in the Circuit Court of Madison County (the "Circuit Court"), Civil Action No. CI-2018-0276JR (the "State Court Action") based on a commercial guaranty that Davis signed in favor of BankPlus. Davis allegedly guaranteed payment of VC Macon's obligations under a loan.

On January 25, 2019, VC Macon, who is not a party to the State Court Action, filed a Notice of Removal (the "Removal Notice") (Adv. Dkt. 1) with the Clerk of the Bankruptcy Court, thereby commencing the Adversary. In the Removal Notice, VC Macon asserts that the State Court Action is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (M), (N), and (O) and arises out of, or relates to, the above-referenced bankruptcy case under 28 U.S.C. § 1334(b). The alleged basis for removal jurisdiction set forth in the Removal Notice is that the State Court Action "has given rise to claims of indemnity" by Davis against VC Macon "based upon corporate documents and upon applicable state law." Davis has not asserted any third-party claim against VC Macon in the State Court Action, and VC Macon has not filed a motion to intervene in, or to be added as a necessary party to, the Adversary.

On January 29, 2019, the Court issued the Show Cause Order to determine, *inter alia*, whether it had subject matter jurisdiction. The day of the Hearing, the Court held a telephonic status conference (the "Status Conference") (Dkt. 8) to address the request of counsel for VC Macon to reschedule the Hearing at an earlier time to allow a full day of testimony and the introduction of numerous exhibits. At the Status Conference, the Court clarified that the scope of the Hearing would be limited to determining whether removal was procedurally proper when VC Macon filed the Removal Notice directly with the Clerk of the Bankruptcy Court rather than the Clerk of the U.S. District Court for the Southern District of Mississippi. The Court informed counsel at the Status Conference that it would reserve for later decision, if necessary, whether VC Macon lacks standing to remove the State Court Action based on the language of 28 U.S.C. § 1452(a) and the definition of "party" under federal law. Because the narrow issue to be addressed at the Hearing concerned only a question of law, the parties agreed that no evidence would be necessary, and the Hearing would consist only of oral arguments of counsel. With that clarification, the Hearing proceeded as originally scheduled.

After the Hearing, BankPlus filed BankPlus's Motion for Abstention and Remand (the "Motion to Remand") (Dkt. 11). In the Motion to Remand, BankPlus asks the Court to abstain from hearing the State Court Action based on VC Macon's alleged lack of standing to remove the State Court Action, the same issue the Court reserved for later decision at the Status Conference. Because resolution of the Show Cause Order could render the Motion to Remand moot, the Court issued the Order Regarding BankPlus's Motion for Abstention and Remand (Dkt. 12), instructing the parties that the Motion to Remand would not be scheduled for a hearing and no deadline to respond to the Motion to Remand would be set until after resolution of the Show Cause Order.

However, in the Motion to Remand, on page two, BankPlus argues that VC Macon improperly removed the State Court Action directly to this Court. This is the same issue addressed in this Order.

Discussion

A purely statutory right, the removal of state court actions to federal court is governed by 28 U.S.C. § 1452. Section 1452 provides that "[a] party may remove any claim or cause of action in a civil action . . . *to the district court* for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452(a) (emphasis added). Removal statutes must be strictly construed because of significant federalism concerns. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941).

Section 1452 was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 (1984) (the "1984 Act"), to replace the prior removal statute, 28 U.S.C. § 1478. Congress passed the 1984 Act in response to the U.S. Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which held parts of the Bankruptcy Act of 1978 unconstitutional because it improperly endowed Article I bankruptcy judges with Article III powers. The only relevant difference in wording between the old removal statute and the current removal statute is that "district court" appears in 28 U.S.C. § 1452(a) where "bankruptcy court" used to appear in 28 U.S.C. § 1478(a).[1]

[1] The predecessor removal statute, 28 U.S.C. § 1478(a), provided: "A party may remove any claim or cause of action in a civil action . . . to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action." 28 U.S.C. § 1478(a).

The bankruptcy jurisdiction statute, 28 U.S.C. § 1334(a)-(b), grants district courts original, but not exclusive, jurisdiction of all civil proceedings "arising in," "arising under," or "related to" a bankruptcy case. *See Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 994 (5th Cir. 1985). "To determine bankruptcy jurisdiction, it is unnecessary to distinguish between [proceedings arising under, arising in a case under, or related to a case under title 11]; it is only necessary to determine whether a matter is at least 'related to' the bankruptcy." *Broyles v. U.S. Gypsum Co.*, 266 B.R. 778, 782 (E.D. Tex. 2001). "Federal courts have 'related to' subject matter jurisdiction over litigation arising from a bankruptcy case if the 'proceeding could conceivably affect the estate being administered in bankruptcy.'" *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 386 (5th Cir. 2010).

When Congress rewrote the portions of bankruptcy law governing jurisdiction of the bankruptcy courts in the 1984 Act, it made bankruptcy courts "a unit of the district court" and classified bankruptcy judges as "judicial officer[s] of the district court." 28 U.S.C. § 151. The district court may refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11" to the bankruptcy judges within their district. 28 U.S.C. § 157(a); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015). Although the district court's power to refer is discretionary, district courts routinely refer most bankruptcy cases to the bankruptcy court. *Geruschat v. Ernst Young LLP (In re Seven Fields Dev. Corp.)*, 505 F.3d 237, 253-54 (3d Cir. 2007). If a bankruptcy court later determines that the requested relief is beyond its authority, it may enter "[a] recommendation for withdrawal of the reference . . . to the district court that originally conferred jurisdiction." *Centrust Sav. Bank v. Love*, 131 B.R. 64, 66 (S.D. Tex. 1991). Likewise, the district court may withdraw any reference to the bankruptcy court on its own motion

or on timely motion of any party. *Wellness Int'l Network*, 135 S. Ct. at 1939.

Consistent with the broad authority of district courts to refer matters to bankruptcy court, the U.S. District Court for the Southern District of Mississippi (the "District Court") issued a local uniform rule that automatically refers all bankruptcy cases and proceedings in the Southern District of Mississippi to the bankruptcy judges of that district (collectively, the "Bankruptcy Court"). L.U. Civ. R. 83.6 (S.D. Miss. 2018) ("District Court Local Rule 83.6"). For this reason, a bankruptcy petition need not be filed first with the Clerk of the District Court and then referred to the bankruptcy judges of the district. Nor must an adversary proceeding in a bankruptcy case be filed first with the Clerk of the District Court and then referred to the Bankruptcy Court. In each instance the reference is accomplished automatically by District Court Local Rule 83.6.

The procedure for removing a state court action to bankruptcy court is governed by Rule 9027 of the Federal Rules of Bankruptcy Procedure ("Rule 9027"). Rule 9027(a)(1) provides that "[a] notice of removal shall be filed with the *clerk* for the district and division within which is located the state or federal court where the civil action is pending." FED. R. BANK. P. 9027(a)(1) (emphasis added). Rule 9001(3) of the Federal Rules of Bankruptcy Procedure ("Rule 9001(3)"), in turn, defines "clerk" as the "bankruptcy clerk, if one has been appointed, otherwise clerk of the district court." FED. R. BANKR. P. 9001(3). The Bankruptcy Court has an appointed bankruptcy clerk.

There is a split between the U.S. District Courts for the Northern and Southern Districts of Mississippi with respect to whether a notice of removal must be filed with the clerk of the district court or the clerk of the bankruptcy court. This split within the judicial districts has led to uncertainty among practitioners about the proper place to file a notice of removal. Indeed, counsel

for VC Macon represented to the Court at the Hearing that he had never before filed a notice of removal with the clerk of the district court whereas counsel for BankPlus stated the opposite, that he had never before filed a notice of removal with the clerk of the bankruptcy court.

In the U.S. District Court for the Southern District of Mississippi, Judge Henry T. Wingate ruled twenty-six years ago in *Morgan v. Bruce*, Civ. A. No. H87-0001(W), 1993 WL 786892, at *6 (S.D. Miss. Feb. 1, 1993), that by replacing 28 U.S.C. § 1478(a) with 28 U.S.C. § 1452(a), Congress intended for removal petitions to be filed with the District Court rather than the bankruptcy court and, therefore, the bankruptcy court acquires jurisdiction over a removed action only upon referral by the District Court. *Morgan*, 1993 WL 786892, at *6; *see also Centrust Sav. Bank*, 131 B.R. at 66 ("Because the bankruptcy courts are subordinate operations of the district courts, removal is never proper directly to the bankruptcy court.").

Judge Wingate noted that part of the confusion arose out of the inconsistency then existing between 28 U.S.C. § 1452(a) and Rule 9027. In 1985, when the removal petition in question was filed, Rule 9027 provided that removal must be filed with the "bankruptcy court,"[2] whereas 28 U.S.C. § 1452(a) told litigants to file removal petitions with the District Court. *Morgan*, 1993 WL 786892, at *7. Judge Wingate, however, declined to hold that the bankruptcy court lacked jurisdiction or authority but instead ruled that the filing of the removal petition directly with the clerk of the bankruptcy court was harmless error. Judge Wingate noted that the litigant who challenged the bankruptcy court's jurisdiction had agreed to remove the case directly to the bankruptcy court and did not object to the bankruptcy court's authority until after it received an

[2] Judge Wingate noted that in 1987, Rule 9027 was amended to require that removal petitions be filed with the clerk of the district or division where the state action is pending. *Morgan*, 1993 WL 786892, at *6

adverse ruling.

In contrast, in the U.S. District Court for the Northern District of Mississippi, there are no reported opinions addressing whether a notice of removal may be filed directly with the clerk of the bankruptcy court, however, removal of state court actions directly to the bankruptcy court are routinely allowed. A majority of courts from other jurisdictions have agreed with this practice. *See Meritage Homes Corp. v. JPMorgan Chase Bank, N.A.*, 474 B.R. 526, 534 (Bankr. S.D. Ohio 2012). Although they recognize that 28 U.S.C. § 1452(a) uses the phrase "to the district court" when allowing for removal of claims and causes of action, these courts reject a literalistic reading of the statute. They reason that under 28 U.S.C. § 151, bankruptcy judges are judicial officers of the district court and, therefore, removal of a claim or cause of action directly to the bankruptcy court is the "functional equivalent" of removal to the district court. *See Indus. Clearinghouse, Inc. v. Mims (In re Coastal Plains, Inc.),* 338 B.R. 703, 711 (N.D. Tex. 2006). They read Rules 9027(a) and 9001(3) together as allowing the direct filing of a notice of removal with the bankruptcy clerk. *Coastal Plains, Inc.*, 338 B.R. at 711. Other courts have concluded that where a general order of reference is entered by the district court referring all bankruptcy matters to the bankruptcy court, notices of removal are properly filed in the bankruptcy court. *AG Indus., Inc. v. AK Steel Corp. (In re AG Indus., Inc.),* 279 B.R. 534, 538 n.1 (Bankr. S.D. Ohio 2002).

Here, VC Macon removed the State Court Action directly from the Circuit Court to this Court. Under *Morgan*, VC Macon should have removed the State Court Action to the District Court. VC Macon conceded at the Hearing that *Morgan* is controlling law in this judicial district but argued that *Morgan* was wrongly decided, and the "culture" is to allow removal directly to the bankruptcy court. VC Macon insisted that any defect in the removal procedure did not deprive

this Court of its subject matter jurisdiction or Judge Wingate would not have found harmless error. He urged the Court to find that BankPlus had waived the procedural defect.

The Court declines to find harmless error in the absence of facts analogous to those in *Morgan*. Months after *Morgan*, Judge Wingate explained in *Searcy v. Knostman* that he upheld the removal of the case directly to the bankruptcy court in *Morgan* because of "a number of circumstances peculiar to that case" but that removal of a state court action should be filed with the clerk of the district court. 155 B.R. 699, 705 & n.11 (S.D. Miss. 1993). Those "peculiar circumstances" included the then existing inconsistency between 28 U.S.C. § 1452 and Rule 9027, the initial agreement of both parties to remove the state court action directly to bankruptcy court, and the litigant's late challenge to the bankruptcy court's authority only after it received an adverse ruling. None of those facts are present here where there is no longer any inconsistency between 28 U.S.C. § 1452 and Rule 9027, BankPlus did not agree to remove the State Court Action to this Court, and the litigation in the Adversary is still in its infancy, discovery not yet having begun.

VC Macon next argues that by local rule actions removed under 28 U.S.C. § 1452 are deemed automatically referred from the District Court to this Court. Judge Wingate, however, expressly rejected that argument in *Morgan*, holding that a referral is necessary in a removed action notwithstanding the presence of a general referral order or local rule. Finally, VC Macon argues that because bankruptcy courts are units of the district courts, removal to the district court is unnecessary. Judge Wingate, however, considered and rejected that argument too.

Indeed, Judge Wingate's analysis in *Morgan* is wholly consistent with the U.S. Supreme Court's watershed decision in *Stern v. Marshall*, 564 U.S. 462 (2011), where the U.S. Supreme Court demonstrated its reluctance to allow bankruptcy judges to wield dispositive authority over

state-law claims. There, the Supreme Court considered the constitutional limitations that Article III imposed on 28 U.S.C. § 157(b) and held that the statute violated Article III to the extent the statute authorized a bankruptcy court to enter a final judgment on an issue that did not "stem[] from the bankruptcy itself" or that would not "necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499. *Stern* illustrates that the removal issue here implicates more than a question of statutory interpretation. *See Wellness Int'l Network*, 135 S. Ct. at 1944-45; *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 36 (2014).

Interpreting the removal statute to permit removal from a state court to the bankruptcy court undermines the district court's power to refer matters to the bankruptcy court. The bankruptcy court's jurisdiction is purely derivative of the district court's jurisdiction. Direct removal suggests bankruptcy courts have jurisdiction of bankruptcy proceedings independent from or co-equal to the authority granted Article III courts. In the absence of "peculiar circumstances," the right of direct removal to the Bankruptcy Court ended with *Marathon*, the Act of 1984, *Morgan*, and *Stern*.

Conclusion

Following *Morgan*, a notice of removal seeking to remove any state court action to this Court is procedurally improper and has no legal effect in the absence of unusual circumstances. The Court finds that VC Macon's direct removal to this Court did not comply with the requirements of 28 U.S.C. § 1452(a), as interpreted by *Morgan*, and, therefore, the Adversary should be remanded to the Circuit Court under 28 U.S.C. § 1452(b). Having reached this conclusion, the Court need not consider the Motion to Remand beyond BankPlus's procedural challenge to the removal, which should be denied without prejudice as moot.

IT IS, THEREFORE, ORDERED that the Removal Notice is procedurally improper and has no legal effect.

IT IS FURTHER ORDERED that the Adversary is remanded to the Circuit Court under 28 U.S.C. § 1452(b).

IT IS FURTHER ORDERED that the Motion to Remand is denied without prejudice as moot.

##END OF ORDER##